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EXAMINER

MCPARTLIN, SARAH BURNHAM

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte CARLOS SANCHEZ

Appeal 2015-003696
Application 13/750,818
Technology Center 3600

Before JILL D. HILL, LISA M. GUIJT, and ERIC C. JESCHKE,
Administrative Patent Judges.

HILL, *Administrative Patent Judge.*

DECISION ON APPEAL

STATEMENT OF THE CASE

Carlos Sanchez (Appellant) appeals under 35 U.S.C. § 134 from the Examiner's final decision rejecting claims 1–10. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

BACKGROUND

Sole independent claim 1, reproduced below, represents the claimed invention, with disputed limitations italicized.

1. A device to support a passenger in a vehicle, comprising:
 - a *U-shaped* frame defining an X-Y plane and having a first member *extending outwardly* along a Z axis from a first end of said frame, wherein said Z axis is perpendicular to said X-Y plane;
 - a first securing mechanism extending outwardly from said frame to engage a portion of a passenger seat in said vehicle;
 - a first cushion attached to said first member;wherein:
 - said first cushion covers the entire first member;
 - said first cushion is configured to be positioned adjacent to a top of a car seat.

REJECTIONS

- I. Claims 1 and 2 stand rejected under 35 U.S.C. § 102(b) as anticipated by Maisenhalder (US 4,971,393, iss. Nov. 20, 1990). Non-Final Act. 2.
- II. Claims 3–10 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Maisenhalder and Maassarani (US 8,141,955 B1, iss. Mar. 27, 2012). Non-Final Act. 3.

OPINION

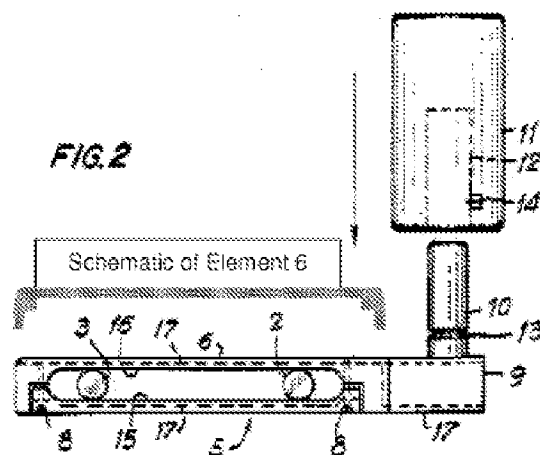
Rejection I

Appellant argues claims 1 and 2 as a group. Appeal Br. 9. We select claim 1 as representative, such that claim 2 stands or falls with claim 1. *See* 37 C.F.R. § 41.37(c)(1)(vii).

Regarding claims 1 and 2, the Examiner finds that Maisenhalder discloses, *inter alia*, “a u-shaped frame member (6) defining an X-Y plane,” and “a first member (10) extending outwardly along a z-axis from a first end of” the u-shaped frame member (6), wherein the “z-axis is perpendicular to said X-Y plane.” Non-Final Act. 2.

Appellant argues that Maisenhalder’s frame member 6 is a bar and is thus not U-shaped, as recited in claim 1. Appeal Br. 8. Appellant contends that Maisenhalder’s frame is L-shaped, rather than U-shaped. *Id.*; Reply Br. 4 (“Therefore, Maisenhalder itself refers to front bar 6, rear bar 7, axle 9, and carrying element 10, in combination, as an ‘essentially L-shaped’ assembly.”).

The Examiner responds that Maisenhalder’s bar 6 is indeed U-shaped when viewed from above, providing the following annotated Figure 2 of Maisenhalder. Ans. 3.



Appellant replies that Maisenhalder's bar 6 "can only be accurately described as a portion of an elongated support bar." Reply Br. 4–5. Appellant's reply does not address the Examiner's contention, as supported by annotated Figure 2 above, that Maisenhalder's front bar 6 is itself U-shaped in an X-Y plane. Maisenhalder's front bar 6 being "a portion of an elongated support bar" does not refute that it has a U shape. We are not persuaded that the Examiner erred in finding that Maisenhalder discloses a U-shaped frame defining an X-Y plane.

Appellant also argues that Maisenhalder's first member 10 does not extend outwardly along a Z-axis from a first end of U-shaped frame member 6, because Maisenhalder's carrying element 10 attaches to its axle 9, rather than to its bar 6. Reply Br. 5. This argument is made for the first time in the Reply Brief without good cause being shown (37 C.F.R. § 41.41(b)(2)), but we address the argument in an effort to expedite prosecution of this matter. In making this argument, Appellant does not explain why "extending outwardly . . . a first end of said frame," as recited in claim 1, should be construed so narrowly that it prohibits use of interim element 9 that secures Maisenhalder's carrying element 10 to its bar 6. Indeed, claim 1 does not recite that the first member "directly contacts" or "extends directly from" an end of the U-shaped member. We are not persuaded that the Examiner's finding is in error. We sustain the rejection of independent claim 1, and dependent claim 2 falls with claim 1.

Rejection II

Claim 3

Regarding claim 3, which recites sandwiching a passenger between first and second cushions, Appellant argues that Maassarani fails to cure the

deficiency of Maisenhalder alleged above regarding claim 1. Appeal Br. 9; Reply Br. 6. For the reasons set forth above, we are not persuaded by this argument.

Appellant additionally argues that Maisenhalder and Maassarani fail to teach or suggest, *inter alia*, the recitations of claim 3. *Id.* at 10. 37 C.F.R. § 41.37 requires more substantive arguments in an appeal brief than a mere recitation of the claim elements and a naked assertion that the corresponding elements were not found in the prior art. *See In re Lovin*, 652 F.3d 1349, 1357 (Fed. Cir. 2011). We nonetheless consider the patentability of claim 3 separately to expedite prosecution of this matter.

The Examiner responds that Maassarani's Figure 6 discloses "first (90) and second cushions (92) . . . [that] are positioned to sandwich a passenger seat between them." Ans. 4. The Examiner concludes that "the duplication of Maisenhalder elements (9)(10)(11) on an opposite side of the u-shaped member (6) to create cushioning elements positioned to sandwich a passenger seat there between would have been obvious" because it is a "mere duplication of essential working parts of a known device" that "requires only routine skill in the art." *Id.*

Appellant replies that, in the Examiner's proposed combination adding another set of elements, 9, 10, 11, to an opposite end of bar 6, the Examiner admits that the second carrying member would not "attach to a second end of the frame, as required by claim 3." Reply Br. 7.

Claim 3 recites the second member "extending outwardly from a second end of said frame." For the reasons set forth above, we are not persuaded that "extending outwardly from . . . the frame" should be construed so narrowly that it prohibits use of interim element 9 securing

Maisenhalder's carrying element 10 to its bar 6. We are not persuaded that the Examiner's finding or conclusion is in error. We sustain the rejection of dependent claim 3.

Appellant then contends, for the first time in the Reply Brief, that the Examiner "fail[s] to show how the device of [Maassarani's] FIG 6 can be 'positioned to sandwich a passenger seat between [the cushions].'" Reply Br. 8. This argument is made for the first time in the Reply Brief without good cause being shown (37 C.F.R. § 41.41(b)(2)), but we will address the argument in an effort to expedite prosecution of this matter. This argument is not persuasive because, rather than refuting the Examiner's finding regarding the prior art teaching or suggesting to one skilled in the art that a passenger could be sandwiched between the first and second members of the combined references, Appellant contends that neither Maassarani nor the Examiner explicitly state *how* sandwiching would be accomplished. Reply Br. 8.

Maassarani states that head rests alleviate the neck strain associated with a person trying to sleep while seated by "supporting a portion of the user's head, such as each side cheek." Maassarani 1:5–11; Fig. 1; 5:44–47. This discussion of supporting each side of a user's cheek suggests sandwiching the passenger between the first 90 and second 92 members of Maassarani (*see* Maassarani Fig. 6; 5:36–47) and thereby explains how the combined device with two cushions would sandwich a passenger between opposing cushions. We are not persuaded by this argument.

Claim 4

Claim 4 recites the first and second cushions being "configured to support a head and a shoulder of a passenger." Appellant initially contends

that “[t]he devices described and claimed by both Maisenhalder and Maassarani cannot support both the head and a shoulder of a passenger sitting in a car seat,” without further explanation. Appeal Br. 10.

The Examiner responds that

the body portion supported by the cushion is dependent upon the size of the passenger and the height of the seat. The cushion is capable of supporting both a head and shoulder of a seat occupant (i.e. the occupant could easily lean an outside surface of their shoulder against an inside surface of cushion (11) and tilt their head downward and onto a top surface of cushion (11)).

Ans. 5.

Appellant replies that Maisenhalder exclusively refers to its device as a “head-rest” and never mentions a passenger’s shoulder. Reply Br. 9. Appellant contends that “a bodily contortion required to rest a shoulder against, and simultaneously rest the head against, a single cushion projecting outwardly from the top of a car seat is not ‘easy’,” and that the Examiner “fails to demonstrate that resting a shoulder against, and simultaneously resting the head against, a single cushion projecting outwardly from the top of a car seat is even possible.” *Id.* at 9–10.

Appellant’s own Specification fails to mention shoulder support, referring only to a “head support device.” *See, e.g.*, Spec. ¶ 2; Fig. 8. Absent an explanation to the contrary, we agree with the Examiner’s general contention that “the body portion supported by the cushion is dependent upon the size of the passenger and the height of the seat” (Ans. 5). If Appellant is contending that the Specification supports claim 4, we discern no error in the Examiner’s contention that one skilled in the art would

understand that the combined device of Maisenhalder and Maassarani would similarly be capable of supporting a head and shoulder of certain passengers.

Claims 5–10

Regarding the rejection of claims 5–10, Appellant relies on the arguments made regarding claims 1 and 3. Appeal Br. 11. For the reasons set forth above, we are not persuaded by Appellant’s argument.

For the reasons set forth above, we sustain Rejection II.

DECISION

We AFFIRM the rejection of claims 1 and 2 under 35 U.S.C. § 102(b) as anticipated by Maisenhalder.

We AFFIRM the rejection of claims 3–10 under 35 U.S.C. § 103(a) as unpatentable over Maisenhalder and Maassarani.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED